STATE OF MICHIGAN

COURT OF APPEALS

SHARLENE FELDER, Plaintiff-Appellant,	UNPUBLISHED June 16, 2015
v	No. 320900 Wayne Circuit Court
CITY OF LINCOLN PARK, Defendant-Appellee.	LC No. 13-004845-NO

Before: JANSEN, P.J., and SAWYER and FORT HOOD, JJ.

PER CURIAM.

Plaintiff, Sharlene Felder, appeals as of right an order granting defendant, the City of Lincoln Park's Motion for Summary Disposition in this premises liability action. On appeal, plaintiff argues that the trial court erred in granting defendant's motion for summary disposition. Specifically, plaintiff asserts that she provided proper notice to defendant consistent with MCL 691.1404. We affirm.

This case arises out of an incident that occurred on July 22, 2011. On that day, plaintiff was exiting her vehicle in Lincoln Park to access an ATM. Upon exiting her vehicle, plaintiff stepped into a large, unseen pothole in the road, causing her to fall. Plaintiff sustained injuries, and brought suit against defendant. Defendant filed a motion for summary disposition, which the trial court granted.

The trial court granted summary disposition pursuant to MCR 2.116(C)(7). We review a trial court's determination on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Pursuant to MCR 2.116(C)(7), the moving party is entitled to summary disposition if the plaintiff's claims are "barred because of immunity granted by law[.]" "A party may support a motion under 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence." *Maiden*, 461 Mich at 119. To the extent that the arguments present questions of statutory interpretation, we review de novo. *Spectrum Health Hosps v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503, 515; 821 NW2d 117 (2012). A statute should be interpreted according to its plain and ordinary meaning. *Id.*

Plaintiff argues that the trial court erred in granting defendant's motion for summary disposition. According to plaintiff, the trial court incorrectly found that governmental immunity applied to defendant because plaintiff did not satisfy the procedural requirements necessary to invoke the "highway exception." Plaintiff asserts that the trial court erred in finding that her

notice pursuant to MCL 691.1404 did not provide the exact location and nature of the defect in question. We disagree.

The governmental tort liability act, MCL 691.1401 *et seq*., broadly shields a governmental agency from tort liability "if the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1); *Grimes v Mich Dep't of Transp*, 475 Mich 72, 76-77; 715 NW2d 275 (2006). However, several exceptions allow recovery against a government agency. Plaintiff's claim was based on MCL 691.1402(1), the highway exception. MCL 691.1402(1) provides, in relevant part:

> Each governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency.

The Michigan Supreme Court has ruled that "the immunity conferred upon governmental agencies is *broad*, and the statutory exceptions thereto are to be *narrowly* construed." *Nawrocki v Macomb Co Road Comm*, 463 Mich 143, 158; 615 NW2d 702 (2000). "Because [MCL 691.1402(1)] is a narrowly drawn exception to a broad grant of immunity, there must be strict compliance with the conditions and restrictions of the statute. Thus, we are compelled to strictly abide by these statutory conditions and restrictions in deciding" whether summary disposition was appropriate. *Id*. at 158-159 (citation omitted).

In order to invoke the highway exception, a plaintiff must comply with the notice requirements of MCL 681.1404. MCL 691.1404(1) provides:

> (1) As a condition to any recovery for injuries sustained by reason of any defective highway, the injured person, within 120 days from the time the injury occurred, except as otherwise provided in subsection (3) shall serve a notice on the governmental agency of the occurrence of the injury and the defect. *The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant.* [Emphasis added.]

In *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 219; 731 NW2d 41 (2007), our Supreme Court established that "MCL 691.1404 is straightforward, clear, unambiguous, and not constitutionally suspect" and "must be enforced as written." Notice given to the governmental agency must comply with MCL 691.1404(1) but "need only be understandable and sufficient to bring the important facts to the governmental entity's attention." *Plunkett v Dep't of Transp*, 286 Mich App 168, 176; 779 NW2d 263 (2009). A notice should not be found defective when it is in substantial compliance with the statute. *Id*. at 177. "[A] liberal construction of the notice requirements is favored to avoid penalizing an inexpert layman for some technical defect." *Id*. at 176. However, a plaintiff must at least "adequately" describe the location and nature of the defect, so as to reasonably appraise the governmental entity of the plaintiff's claims. *Id*. at 178.

"The principal purposes to be served by requiring notice are simply (1) to provide the governmental agency with an opportunity to investigate the claim while it is still fresh and (2) to remedy the defect before other persons are injured." *Id*. at 176-177.

Michigan courts have considered the sufficiency of a notice pursuant to MCL 691.1404. It seems well-established at this point that an incorrect or erroneous description renders notice insufficient. *Jakupovic v City of Hamtramck*, 489 Mich 939; 798 NW2d 12 (2011); *Thurman v City of Pontiac*, 295 Mich App 381, 386; 819 NW2d 90 (2012). In addition, it has also been held that a description that places the defect somewhere near the intersection of two roads is too vague to identify the place of injury and to comply with the statute. *Dempsey v Detroit*, 4 Mich App 150, 151-152; 144 NW2d 684 (1966).

In *Burise v City of Pontiac*, 282 Mich App 646; 766 NW2d 311 (2009), this Court held that notice was sufficient where the plaintiff offered the following description:

> At approximately 12:45 p.m. on June 13, 2006, [plaintiff] slipped and fell on East Huron and Saginaw Street in the City of Pontiac while crossing Saginaw Street, her slip and fall due to a defective traveled portion of the roadway.
>
> The precise location by virtue of the addresses is located between Bo's Brewery, 51 North Saginaw, and the Pontiac Osteopathic Hospital Building at 64 North Saginaw. The nature of the defect was an extremely deep, wide and long pothole that had been in disrepair.
>
> Please find a copy of the photographs reflecting the precise location. The plaintiff's footwear was gym shoes and her injury was a torn Achilles tendon. [*Id*. at 648, 654.]

In *McLean v City of Dearborn*, 302 Mich App 68, 75-76; 836 NW2d 916 (2013), this Court held that the written description of "hazardous and defective city street," alone, was deficient, but that the inclusion of photographs of the defect provided sufficient notice.

In the current case, plaintiff sent two notices to defendant. Plaintiff's first notice stated that her fall occurred at "Ford Road at Fort Street, Lincoln Park, MI," and further stated that plaintiff fell "in front of the PNC Bank[.]" Plaintiff's second notice stated that the incident occurred at "Ford Road in front of the PNC Bank at Fort Street, Lincoln Park," and further provided that plaintiff fell "on Ford Road in front of the PNC Bank at Fort Street[.]"

The two most obvious concerns with plaintiff's notice are the lack of an address for the location and the lack of a photograph or a map attached to the notice to provide further description. Generally, cases in which the notice was deemed sufficient, the plaintiff included an address for the location or a photograph or other visual depiction. *McLean*, 302 Mich App at 75-76; *Burise*, 282 Mich App at 648, 654. Here, plaintiff could have easily attached a map or diagram of the location. Further, pictures of the defect in context of the surrounding area would have been helpful to identifying the exact location. Plaintiff also could have provided an adjacent address for the PNC bank with the notice.

Defendant raises concern with certain aspects of plaintiff's notices, some of which raise concern and illustrate ambiguity. As defendant points out, it seems that Ford Road actually faces the side of PNC bank, as opposed to the front entrance. The front entrance actually faces Fort Street. Given the reference to Fort Street, the "in front of" description could prove ambiguous. On the other hand, plaintiff's notice clearly stated that her fall occurred on Ford Road, and only one side of the PNC bank faces Ford Road. Defendant also asserts that plaintiff's reference to the intersection was confusing, as her fall did not occur at the intersection. Instead, plaintiff fell several car lengths away from the intersection, directly past the driveway of the bank, and on the north side of Ford Road. We agree with defendant that, minimally, plaintiff should have referenced the driveway of the bank to provide context for the location, especially in light of the fact that she was parked directly behind the driveway to the bank. Inclusion of an accessible landmark in relation to the description would have certainly provided context for the exact location of the pothole. Defendant also finds it problematic that plaintiff did not state that the pothole was in the middle of the street as opposed to the curb. Again, we agree that inclusion of these details would have further assisted defendant in identifying the exact location of the defect.

Overall, we conclude that while the general area of plaintiff's accident could be ascertained from the provided notice, the exact location of the pothole was not clear. This is especially true considering plaintiff's generic description of the defect as a "pothole." Based on the notice provided, defendant would be unable to find the specific pothole referenced by plaintiff, the "exact location." *Plunkett*, 286 Mich App 168, 176-177. Accordingly, the trial court did not err in granting defendant summary disposition.

Given our disposition on this issue, it is unnecessary for us to address plaintiff's remaining arguments.

Affirmed. Defendant, the prevailing party, may tax costs. MCR 7.219.

/s/ Kathleen Jansen
/s/ David H. Sawyer
/s/ Karen M. Fort Hood